INTERIOR BOARD OF INDIAN APPEALS

Vincent Blackhawk v. Billings Area Director, Bureau of Indian Affairs

24 IBIA 275 (10/21/1993)

Related Board cases:
21 IBIA 144
23 IBIA 266

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

VINCENT BLACKHAWK
v.
BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 93-57-A Decided October 21, 1993

Appeal from the award of a lease.

Vacated and remanded.

1. Indians: Leases and Permits: Generally

   Where the Bureau of Indian Affairs implements a tribal policy concerning the leasing of Indian land on the tribe's reservation, the Bureau shares the tribe's responsibility to inform affected persons about the requirements of the policy.

2. Indians: Lands: Individual Trust or Restricted Lands: Generally--Indians: Leases and Permits: Generally

   Where a tribe has adopted a policy concerning "owner's use" of land in fractionated ownership, the provisions of 25 CFR 162.2(a)(4) must be read in conjunction in the tribal policy.

3. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Discretionary Decisions--Indians: Leases and Permits: Generally

   Decisions concerning whether or not to grant a lease of trust or restricted land are committed to the discretion of the Bureau of Indian Affairs. It is not the Board's function, in reviewing such decisions, to substitute its judgment for that of the Bureau. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

APPEARANCES: James E. Torske, Esq., Hardin, Montana, for appellant; Richard Whitesell, Billings Area Director, pro se.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Vincent Blackhawk seeks review of a January 26, 1993, decision of the Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), awarding a lease of Crow Allotment 1205 to Darrell Rathkamp. For the reasons discussed below, the Board vacates the Area Director's decision and remands this matter to him for further proceedings.

Background

Crow Allotment 1205 is a 150-acre tract in fractionated ownership. Appellant owns an 11/15 interest, and 15 other individuals own small shares in the remainder. In 1990, Rathkamp sought a negotiated lease of the allotment, as did Mac Castillo. Castillo prevailed initially and was awarded a lease for a five-year term beginning October 1, 1990. Rathkamp appealed, alleging improprieties in the execution of some of Castillo's landowner consent forms. In Rathkamp v. Billings Area Director (Rathkamp I), 21 IBIA 144 (1992), the Board vacated the Area Director's decision and remanded the matter to him for further proceedings.

Following the Board's remand, the Superintendent, Crow Agency, BIA, conducted a meeting of the landowners to discuss whom they preferred as lessee. Appellant and four other landowners were present at the meeting, which was held on March 11, 1992. After listening to presentations by Castillo and Rathkamp, the landowners stated that they preferred Castillo. BIA officials agreed to award the lease to Castillo if all landowners returned consent forms, signed and notarized, by March 20, 1992. BIA and the landowners agreed that, unless all consent forms were returned by that date, the lease would be advertised at the next lease sale.

Appellant and all but two of the other landowners returned consent forms in favor of Castillo. Of the two non-consenting landowners, one did not respond at all and the other stated specifically that she did not agree to the Castillo lease. Accordingly, BIA included Allotment 1205 in a July 29, 1992, lease sale.

Castillo, Rathkamp, and appellant submitted bids. Rathkamp was high bidder. Appellant's bid stated that he was claiming owner's use and would meet the high bid. On October 1, 1992, the lease was awarded to Rathkamp. On October 6, 1992, the Superintendent wrote to appellant, stating:

> Allotment 1205 was included in advertisement to settle the dispute between landowners on who should be awarded the lease. Also, it was agreed by the majority of the landowners to advertise Allotment 1205, if all the landowners did not verify their signature by signing a notarized Consent Form to keep the lease with Mac Castillo.
>
> This is to inform you that your "Owners Use" bid is hereby rejected and a lease will be awarded to the highest bidder, as agreed in the meeting of March 11, 1992.

Appellant appealed to the Area Director. On January 26, 1993, the Area Director affirmed the Superintendent's decision. His decision states in part:

> There was no mention of any desire for owner's use on this tract at the hearing [i.e., the March 11, 1992, meeting], by [appellant] or any of the other landowners, nor was it discussed as a solution to the problem the superintendent had been remanded to resolve by the IBIA. [Appellant] also signed a notarized consent form dated March 16, 1992, expressing his wish to lease the land to Mac Castillo, with no mention of owner's use.
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> * * * * * *
>
> In the Notice of Sale 92-2, Advertisement for Farming and Grazing Leases, the terms of the sale clearly state the conditions that must be met to claim owner's use, "For those TRACTS being advertised which were or are currently under some type of OWNER'S USE agreement, the present interest owner who utilizes the tract per the owner's use agreement has the right to meet the high bid."
>
> This tract was not under owner's use at the time of the sale nor has it ever been. [Appellant] did not comply with two of the qualification stipulations in the current policy regarding owner's use at Crow Agency. They are as follows:
>
> Stipulation No. 2 states: "The applicant must obtain a Majority consents from the other landowners on an Owner's Use lease. If in his judgment the leases are satisfactory, the superintendent may exercise the authority delegated to him in CFR Title 25, 162.6(b) (c) and 162.4 and approve Owner's Use leases."
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> Stipulation No. 3 states: "Applicant must also meet the following set of requirements to qualify for an Owner's use lease:
>
> "a. Must have livestock to pasture and show proof of ownership and number of livestock.
>
> "b. Must own farm machinery to do actual farming practices.
>
> "c. Must provide copies of contract farming agreements for certain jobs the landowner can not do him/her self. ALL SUBLEASES AND ASSIGNMENT SHALL HAVE TO BE APPROVED BY THE AGENCY SUPERINTENDENT."
>
> In your appeal letter, you state that [appellant] is a livestock operator, but you do not state that he actually owns any livestock, or what quantity if he does.

* * * * * *

> The superintendent made the best decision he could make considering the time constraints and the landowners' wishes. In order to avoid this tract from going into idle status, a decision had to be reached that allowed enough time to include the land in the next scheduled lease sale, if the owners were unable to agree upon a lessee. (Emphasis in original)

(Area Director's Decision at 2-3).

Appellant's notice of appeal from the Area Director's decision was received by the Board on March 10, 1993. In addition to his notice of appeal, appellant filed affidavits. The Area Director filed a statement.

Discussion and Conclusions

In his notice of appeal, appellant contends that he expressed interest in an owner's use lease at the March 11, 1992, meeting. He submits his own affidavit and that of Castillo, both stating that, on the day of the meeting, appellant was advised by the Agency Realty Officer that he could not qualify automatically for owner's use but that, if the lease were advertised, he would have to submit a bid stating that he was willing to meet the high bid. Both appellant and Castillo state that the Realty Officer did not advise appellant of any further requirements of the owner's use policy. Appellant contends that he was denied a reasonable opportunity to demonstrate compliance with that policy. Appellant further contends, inter alia, that, given his owner's use bid, the Superintendent was not authorized to award a lease to Rathkamp. 1/

The Area Director's response indicates that the Realty Officer had no recollection of the conversation described by appellant and Castillo. Further, the Area Director states:

> [Appellant] continually refers to himself as a 'livestock operator,' [but] he has not provided any proof of ownership of livestock, nor has he attempted to acquire any adjoining lands or leases to establish a headquarters for a livestock operation. It is very difficult for the BIA to believe [appellant] intends

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1/ Another argument made by appellant is that the Superintendent improperly awarded the lease to Rathkamp because Rathkamp had failed to pay trespass damages assessed against him for alleged trespasses on Allotment 1205.

The trespass assessment was not final at the time of the lease award. Rathkamp appealed the assessment, and his appeal was still pending in October 1992. In January 1993, the Board affirmed the assessment in part and reversed it in part. Rathkamp v. Acting Billings Area Director, 23 IBIA 266 (1993).

to use this property for his own livestock. It is our strong belief that [appellant] intends to illegally sub-let this property.

In reply to the Area Director's statement, appellant states, inter alia, that he owns six horses and five cows and intends to purchase more; that he has been awarded a grazing lease for a tract of tribal land about one mile from Allotment 1205; 2/ that he intends to establish his headquarters on his own land, consisting of approximately 30 acres, which adjoins a 320-acre tract of which he is majority owner, and that both tracts are about one-half mile from Allotment 1205. Finally, appellant states that he does not intend to sublet Allotment 1205. It is apparent that appellant hopes to demonstrate through these statements that he can comply with the requirement of the owner's use policy.

The parties clearly disagree as to whether appellant mentioned his interest in owner's use at the time of the March 11, 1992, meeting. In light of the analysis below, however, the Board finds that it is not necessary to resolve this factual dispute. The Board notes that, in one respect, appellant and the Area Director appear to agree--that is, that the Realty Officer did not inform appellant on March 11, 1992, of the conditions he would be required to meet in order to qualify for owner's use.

The record for this appeal contains an undated, unsigned document which describes the owner's use policy for the Crow Reservation. 3/ It is not

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2/ Appellant submits a copy of this lease, which covers an 83.83-acre tract of tribal land and has a five-year term beginning Nov. 1, 1992. The lease was approved by the Superintendent on Dec. 1, 1992.

3/ The document states:

"THE FOLLOWING IS THE POLICY REGARDING 'OWNER'S USE'. AS DICTATED BY TRIBAL RESOLUTION 76-25A AND THE CODE OF FEDERAL REGULATIONS. A WRITTEN AGREEMENT (LEASE) WILL BE REQUIRED BY A MAJORITY OF THE OWNERS.

"In Order to Qualify for 'Owner's use':

"1. The applicant must be an Heir or devisee with an interest in the heirship land, thus preventing, for example, an individual from purchasing a small interest in heirship land and filing for Owner's Use on the entire tract.

"2. The applicant must obtain a Majority consents from the other landowners on an Owner's Use lease. If in his judgment the leases are satisfactory, the Superintendent may exercise the authority delegated to him in CFR Title 25, 162.6 (b) (c) and 162.4 and approve Owner's use leases.

"3. Applicant must also meet the following set of requirements to qualify for an Owner's Use lease:

"a. Must have livestock to pasture and show proof of ownership and number of livestock.

"b. Must own farm machinery to do actual farming practices.

"c. Must provide copies of contract farming agreements for certain jobs the landowner can not do him/her self. ALL SUB-LEASES AND ASSIGNMENTS SHALL HAVE TO BE APPROVED BY THE AGENCY SUPERINTENDENT.

clear from the document itself, or from anything else in the record, whether and/or how the details of this policy have been made known to landowners on the reservation.

Those who deal with the Federal Government are responsible for familiarizing themselves with duly promulgated regulations. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); All Materials of Montana, Inc. v. Billings Area Director, 21 IBIA 202 (1992), and cases cited therein. Thus, to the extent leasing requirements are published in the Code of Federal Regulations, appellant was charged with knowledge of those requirements, and BIA could properly decline to accept his bid if it failed to meet them. However, appellant's bid was not rejected because of failure to meet regulatory requirements but because of failure to meet requirements of the unpublished owner's use policy.

[1] It is arguable that appellant, who obviously knew that an owner's use policy existed, bore some responsibility for familiarizing himself with its contents. And it is undoubtedly true that the Crow Tribe is responsible for publicizing its own policy. Ultimately, however, because it is BIA which implements the tribal policy, it is BIA which must ensure that the policy is made known to those affected by it. The Board concludes that, where BIA rejects a bid for failure to meet the requirements of the owner's use policy, it must demonstrate that the applicant knew or should have known what those requirements were. BIA might make such a showing, in a case like this one, through proof that the policy was made available to prospective

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fn. 3 (continued)

"4. Applicant must pay other landowners the fair annual rentals to other landowners [sic], (unless otherwise agreed to by all the parties with an interest in the land).

"(Landowners who owe delinquent debts to the Crow Tribe or United States will not be allowed to WAIVE their lease rentals from the Owner's Use lease.)

"5. If more than one heir and/or devisee should file an application for owner's use, and if more than one of the applicants are equally qualified for an Owner's Use lease, the Bureau of Indian Affairs shall grant the owner's use [lease] to the applicant who agrees to pay the highest rental fees for the land, or part thereof, unless a satisfactory compromise agreement can be reached by the competing applicants.

"6. The fair rental value shall be the going rate determined from surrounding existing office lease rates in the area where the tract is located.

"Owner's Use leases will be regulated with the same CFR, Title 25, provisions which govern and maintain all office leases." (Emphasis in original).

A somewhat different version of the owner's use policy for the Crow Reservation was included in the record for Plain Feather v. Acting Billings Area Director, 18 IBIA 26 (1989). It was signed by the Superintendent but, like the present version, undated. It is quoted in footnote 3 of the Board's decision in Plain Feather.

bidders and that landowner/bidders were advised of the need to demonstrate their compliance with the policy in order to claim owner's use. 4/ No such proof is present here.

Appellant also contends that, because he had submitted an owner's use bid, the Superintendent was precluded from awarding a lease to Rathkamp. Appellant bases this argument on 25 CFR 162.2(a), which provides: "The Secretary may grant leases on individually owned land on behalf of: * * * (4) the heirs or devisees to individually owned land who have not been able to agree upon a lease during the three-month period immediately following the date on which a lease may be entered into; provided, that the land is not in use by any of the heirs or devisees. 5/

[2] By its literal terms, the proviso in subsection 162.2(a)(4) appears to apply only in a case where the land is already in use by one of the landowners. 6/ Under this interpretation, appellant could not benefit from the proviso because he is not presently using the land. However, such an interpretation places landowners on the Crow Reservation at somewhat of a disadvantage because, under the owner's use policy, a Crow landowner is precluded from initiating use of his/her land on an informal basis in order to invoke the benefit of subsection 162.2(a)(4). Rather, unlike landowners on some other reservations, 7/ a Crow landowner who seeks to use land in

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4/ Notice of the policy could be given, for instance, in the lease advertisement, which could also advise bidders where copies of the current policy could be consulted.

5/ See also 25 U.S.C. § 380 (1988), which provides:

"Restricted allotments of deceased Indians may be leased, except for oil and gas purposes, by the superintendents of the reservation within which the lands are located * * * when the heirs or devisees of the decedents have been determined, and such lands are not in use by any of the heirs and the heirs have not been able during a three months' period to agree upon a lease by reason of the number of heirs, their absence from the reservation, or for other cause, under such rules and regulations as the Secretary of the Interior may prescribe."

6/ BIA's lease advertisement reflects this interpretation: “For those TRACTS being advertised which were or are currently under some type of OWNER’S USE agreement, the present interest owner who utilizes the tract per the owner’s use agreement has the right to meet the high bid.” (Emphasis in original).

7/ See, for example, Lower Peoples Creek Cooperative v. Acting Billings Area Director, 23 IBIA 297 (1993), which arose on the Fort Belknap Reservation. There, a landowner simply began using a portion of a fractionated allotment, without entering into any agreement with his co-owners and without paying them any compensation. In approving a lease of the remainder of the allotment to another party, BIA excluded the portion under owner's use. The Area Director held in that case, inter alia, that the landowner must compensate his co-owners for the portion he was using. However, the Area Director did not require that a formal lease be executed for that portion, noting that informal arrangements for owner's use were common.

which he/she holds a fractionated interest must enter into a formal lease. The Board concludes that, with respect to the Crow Reservation, the proviso in subsection 162.2(a)(4) must be interpreted in light of the owner's use policy for the reservation. The Board further concludes that, when read together, section 162.2(a)(4) and the owner's use policy require that BIA refrain from granting a lease to a non-landowner, in a case where a landowner seeks an owner's use lease, until the landowner has been given an opportunity to show that he/she qualifies under the owner's use policy. 8/

As the Board stated above, there is no evidence here that BIA provided general notice, prior to or at the time of the lease advertisement, concerning the requirements of the owner's use policy. Absent a showing of such general notice, BIA should be able to show that appellant was given personal notice of the requirements and an opportunity to demonstrate compliance. In this case, it appears that such an opportunity might have been given after the bid opening on July 29, 1992, when BIA irrefutably became aware that appellant was claiming owner's use rights. BIA did not award the lease to Rathkamp until October 1, 1992, two months after the bid opening. Yet, there is nothing in the record here to show that, during that period, BIA consulted appellant concerning his qualifications or even that it attempted to learn about appellant's qualifications from other sources. 9/

[3] BIA's grant or approval of a lease is generally a discretionary action. E.g., Rathkamp I, 21 IBIA at 148; Clausen v. Portland Area Director, 19 IBIA 56, 60 (1990). As the Board stated in those decisions, and has stated on many other occasions, the Board's review authority over discretionary decisions of BIA is limited. It is not the Board's function to substitute its judgment for that of BIA. Rather, it is the Board's responsibility to ensure that proper consideration was given to all legal prerequisites to the exercise of discretion.

In this case, for the reasons discussed above, the Board concludes that one of the legal prerequisites to the proper exercise of BIA's discretionary authority was the provision of an opportunity for appellant to demonstrate

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8/ This conclusion assumes that a landowner submits a bid when a lease is advertised or informs BIA prior to advertisement that he/she wishes to negotiate an owner's use lease. It does not mean that a landowner may wait until after a lease has been awarded to someone else before making an owner's use claim. Cf. Plain Feather, supra; Knows Ground v. Acting Billings Area Director, 19 IBIA 50 (1990).

9/ One piece of evidence that was presumably available to BIA during this period was appellant's pending lease of the tribal tract. The Tribe notified appellant on July 27, 1992, that he was the successful bidder. On Oct. 28, 1992, the Realty Officer sent him the lease for execution.

BIA clearly had questions about appellant's intent and ability to use Allotment 1205 himself. Possibly, however, it might have resolved some of those questions through consultation with appellant.

that he could comply with the requirements of the owner's use policy. The record in this appeal does not demonstrate that appellant was given such an opportunity.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's January 26, 1993, decision is vacated, and this matter is remanded to him for further consideration. 10/

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

10/ The Board does not hold that BIA is required to award the lease to appellant. It is clear that the owner's use policy recognizes and preserves BIA's discretion with respect to the granting of leases. See Paragraph 2: "If in his judgment the leases are satisfactory, the Superintendent may exercise the authority delegated to him in CFR Title 25, 162.6 (b)(c) and 162.4 and approve Owner's use leases."